Supreme Court U.S.
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No. 02-796

IN THE

Supreme Court of the United States

MICHAEL GOLIGHTLY, JOE CARTER, W. HAYS GILSTRAP, JOE MELTON, SUE E. CHILTON, LINDA MELKER, and DUANE R. SHROUFE,

Petitioners,

v.

LAWRENCE MONTOYA, FILIBERTO VALERIO, and CAROLE JEAN TAULMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari should be denied because (1) the Ninth Circuit correctly applied this Court's long standing rulings regarding the Commerce Clause; (2) there is no conflict with the rulings of any other United States Court of Appeals; and (3) the Petition incorrectly characterizes the Ninth Circuit's ruling.

I. THE NINTH CIRCUIT CORRECTLY APPLIED THE COMMERCE CLAUSE.

The Ninth Circuit's application of the Commerce Clause to Arizona's regulations governing access to harvesting of elk and deer follows *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979), where this Court ruled:

> We now conclude that challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources. . . .

Elk and deer are natural resources with commercial value. Arizona permits the buying and selling of the nonedible parts of the elk and deer. There exists

> an inter-state and international market for the antlers and hides of deer and elk. . . . Better quality antlers of elk and deer, almost entirely supplied by hunters, are used for display and for creating art and furniture and can sell for hundreds to thousands of dollars, up to $50,000 for the very best.

Petition, App. 6.

Arizona discriminates against nonresidents in access to these natural resources. It restricts nonresidents to no more than 10% of the available opportunities to harvest and thereby profit from these animals. Ariz. Admin. Code § R12-4-114(E).

The regulation discriminates against non-residents on its face. Therefore, it is subject to strict scrutiny, under which it is the state's burden to show that the discrimination is narrowly tailored to further a legitimate interest. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 578 (1997); *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100-01 (1994). In requiring the District Court to judge Arizona's discrimination against nonresidents by strict scrutiny standards, the Ninth Circuit correctly applied this Court's rulings on the Commerce Clause.

II. NO CONFLICT EXISTS AMONG THE COURTS.

No other United States Circuit Court of Appeals has ruled on the question presented by the Petition. No other court, including those courts mentioned in the Petition, has reached a conflicting conclusion upon similar facts. The Petition is incorrect that a conflict exists between the Ninth Circuit and the Supreme Court of Alaska's ruling in *Shepherd v. State of Alaska*, 897 P.2d 33 (Alaska 1995). *Shepherd* is distinguishable because the by-products of the animals in question could never be legally sold and thus could never enter the stream of commerce.[1] Further, *Shepherd* contains a glaring fundamental flaw which limits it as a precedent, or as a legitimate source of conflict with the Ninth Circuit.

1. The decision in *Terk v. Ruch*, 655 F. Supp. 205 (D. Colo. 1987) is distinguishable on the same grounds.

Shepherd reached its conclusion that the Commerce Clause did not apply to state hunting regulations by following the state ownership theory of wild animals of *Geer v. Connecticut*, 161 U.S. 519 (1896), even though that theory had been explicitly overturned by this Court in the language quoted from *Hughes*, *supra*.

III. THE PETITION MISCHARACTERIZES THE NINTH CIRCUIT'S RULING.

The Petition asserts:

> If preferences for residents in recreational hunting . . . are subjected to strict scrutiny analysis, the *per se* rule of which places no value on the conservation efforts of a state and its citizens, it can only be guessed whether the vitality of the resource, which are the products of those efforts, will continue.

Petition at p. 17. To the contrary, the rule articulated by the Ninth Circuit explicitly values the conservation efforts of a State and its citizens.

The Ninth Circuit explicitly ruled that "Arizona has met its burden under the first part of the strict scrutiny analysis. It has legitimate interests in preserving the health of its game population and maintaining recreational hunting opportunities for its citizens." Petition, App. 21. The question remanded by the Ninth Circuit was "whether Arizona has met its burden under the second part of the inquiry by demonstrating that the cap [on nonresident access to harvest

opportunities] is narrowly tailored to its legitimate ends." *Id.*[2]

The Commerce Clause "does not elevate free trade above all other values." *Maine v. Taylor*, 477 U.S. 131, 151 (1986). As that case demonstrated, when a legitimate state interest, such as protecting the health of its wildlife, cannot be adequately served except by discriminatory imposition upon interstate commerce, the Commerce Clause is not an obstacle to state action. Whether that is the situation under the facts of this case remains to be determined by the District Court.[3]

CONCLUSION

For all the foregoing reasons, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

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2. The Petition also invites the Court to speculate as to how the Ninth Circuit's ruling might implicate resident-nonresident hunting fee differentials. Petition, p. 16. In such a hypothetical case, under the Ninth Circuit's ruling, any state can defend the regulation by demonstrating that it is narrowly tailored to serve a legitimate state interest.

3. The Petition also contains misstatements of fact. At page 5, the Petition states: "Plaintiffs did not argue in the district court or in the court of appeals that Arizona regulation 12-4-114(E) discriminates against interstate commerce with respect to their guiding and outfitting businesses." That is incorrect. Plaintiffs' complaint at paragraphs 34 and 43 explicitly makes this claim, Petition, App. 72-73. Plaintiffs also supported their motion for partial summary judgment on their Commerce Clause claim by submitting evidence of the adverse impact of the nonresident caps upon their guiding and outfitting businesses.

Respectfully submitted,

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